SSS v JTSV

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S8–33–1613 OF 2004
FAIZAH JAMALUDIN J
23 JULY 2020

Family Law — Divorce — Maintenance — Variation application of decree nisi terms — Whether proceedings was 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act' — Whether s 8 of the Law Reform (Marriage and Divorce) (Amendment) Act 2017 allowed for wife's application in variation application — Whether amended s 95 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') applied — Whether amendment to s 95 of the LRA was material change in circumstance which satisfied requirements of s 96 of the LRA — Whether wife could rely on amended s 95 of the LRA as ground for variation application — Law Reform (Marriage and Divorce) Act 1976 s 95

This was the petitioner husband's application under O 14A and/or O 33 r 2 and/or O 33 r 5 of the Rules of Court 2012 ('the ROC') for the determination of five questions of law. The marriage between the husband and wife was dissolved pursuant to a decree nisi dated 1 May 2005 ('the decree nisi'), which was entered by consent between the parties. There was one child to the marriage, CLS, who reached the age of 18 years on 17 January 2018. The terms of the decree nisi included financial provisions for the maintenance, medical and dental costs and the education, including the tertiary education, of the child of the marriage. Section 95 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') was amended by s 7 of the Law Reform (Marriage and Divorce) (Amendment) Act 2017 ('the Amendment Act'). The amendment to s 95 of the LRA came into force on 15 December 2018; after CLS reached the age of 18 years. On 18 July 2019, the wife filed an application to vary the terms of the decree nisi for the husband to be ordered to pay additional maintenance, education fees and medical costs for CLS until he completes his higher education in Australia ('variation application'). She found that the terms of the decree nisi was insufficient to cover CLS' current education and university expenses in Australia. It was the wife's case that the amendment to s 95 of the LRA constituted 'a material change in circumstances' for purposes of s 96 of the LRA. The husband had applied for this court to determine and/or substantially dispose the wife's variation application ('O 14A application'). The issues for determination were: (a) whether these proceedings was an 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act' as provided under s 8 of the Amendment

A Act; (b) whether s 8 of the Amendment Act allowed for the wife's application in the variation application; (c) whether the amended s 95 of the LRA applied; (d) whether the amendment to s 95 of the LRA was a material change in circumstance which satisfied the requirements of s 96 of the LRA; and (e) whether the wife could rely on the amended s 95 of the LRA as a ground B for the variation application.

Held, dismissing the variation application with no order as to costs:

(1) Orders and judgments in matrimonial proceedings were final. There was C no difference in court orders and judgments in matrimonial proceedings from those in civil, commercial or criminal matters. Parties were prevented by the doctrine of res judicata from relitigating any claim or matter that had already been litigated. The wife's contention that the divorce proceedings between her and the husband was still pending when D the Amendment Act came into force on 15 December 2018 because the husband had transferred funds in April 2019 pursuant to para 7.1 of the decree nisi after the Amendment Act came into force was misconceived in law. The husband's action of complying with the court order ie decree nisi, did not reopen the divorce proceedings and make the proceedings E alive and pending. The court did not agree that because of the provision in r 2(2) of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980') the divorce petition was pending when the Amendment Act came into force. If the wife had filed the variation application before the Amendment Act came into operation, the variation application F would have been treated as pending for purposes of the DMPR 1980. It was wrong to conclude that it was the divorce proceedings that was treated as pending for purposes of the DMPR 1980 when the Amendment Act came into operation. This was because the decree nisi, which was the final decree on the divorce petition, had been made on 11 G May 2005. Accordingly, this divorce proceedings was not an 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act' as provided under s 8 of the Amendment Act (see paras 30, 40, 42 & 44–46).

H (2) Section 8 of the Amendment Act did not allow for the wife's application in the variation application since neither this divorce proceedings nor the variation application were 'proceedings commenced or pending immediately before the date of the coming into operation of the I Amendment Act' (see para 47).

(3) Section 95 of the LRA as amended by the Amendment Act did not apply to this instant case since the decree nisi had been granted before to the Amendment Act coming into force and the variation application was filed after the Amendment Act came into force (see para 48).

(4) As neither this divorce proceedings nor the variation application fell within the transitional provisions in s 8 of the Amendment Act, the amendment to s 95 of the LRA, which came into operation after the decree nisi was granted and before the variation application was filed, was not a 'material change in circumstances' justifying a variation of the order for maintenance of the child by the court under s 96 of the LRA (see para 49).

(5) The Amendment Act did not have a retrospective effect except as provided in the transition provision in s 8 of the Amendment Act. Since the decree nisi was granted 13 years before the Amendment Act came into operation, this divorce proceedings was not 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act'. Even if the amendment to s 95 applied to either the divorce proceedings or the variation application, it would not constitute a 'material change in circumstances'. Accordingly, the wife could not rely on the amended s 95 of the LRA as a ground for the variation application (see paras 50–53).

[Bahasa Malaysia summary

Ini adalah permohonan pemohon suami berdasarkan A 14A dan/atau A 33 k 2 dan/atau A 33 k 5 Kaedah-Kaedah Mahkamah 2012 ('Kaedah tersebut') untuk penentuan lima persoalan undang-undang. Perkahwinan antara suami dan isteri dibubarkan berdasarkan dekri nisi bertarikh 1 Mei 2005 ('dekri nisi'), yang dimeterai dengan persetujuan antara kedua belah pihak. Terdapat seorang anak hasil perkahwinan, CLS, yang mencapai usia 18 tahun pada 17 Januari 2018. Syarat-syarat dekri nisi merangkumi peruntukan kewangan untuk nafkah, kos perubatan dan pergigian dan pendidikan, termasuk pendidikan tinggi, anak hasil perkahwinan. Seksyen 95 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) 1976 ('Akta tersebut') telah diubah dengan s 7 Akta Membaharui Undang-Undang (Perkahwinan dan Perceraian) (Pindaan) 2017 ('Akta Pindaan'). Pindaan kepada s 95 Akta tersebut berkuat kuasa pada 15 Disember 2018; setelah CLS mencapai usia 18 tahun. Pada 18 Julai 2019, isteri memfailkan permohonan untuk mengubah syarat dekri nisi agar suami diperintahkan untuk membayar nafkah tambahan, yuran pendidikan dan kos perubatan untuk CLS sehingga dia menamatkan pendidikan tinggi di Australia ('permohonan perubahan'). Dia mendapati bahawa syarat dekri nisi tidak mencukupi untuk menampung perbelanjaan pendidikan dan universiti CLS semasa di Australia. Adalah menjadi alasan isteri bahawa pindaan terhadap s 95 Akta tersebut merupakan 'perubahan material dalam hal keadaan' untuk tujuan s 96 Akta tersebut. Suami telah memohon mahkamah ini untuk menentukan dan/atau secara substansial membuang permohonan perubahan isteri ('permohonan A 14A'). Isu-isu untuk penentuan adalah: (a) sama ada prosiding ini adalah 'tindakan atau prosiding yang bermula atau belum selesai sebaik sebelum tarikh permulaan

kuat kuasa Akta Pindaan' seperti yang diperuntukkan di bawah s 8 Akta Pindaan; (b) sama ada s 8 Akta Pindaan membenarkan permohonan isteri dalam permohonan perubahan; (c) sama ada pindaan s 95 Akta tersebut terpakai; (d) sama ada pindaan pada s 95 Akta tersebut adalah perubahan material dalam hal keadaan yang memenuhi kehendak s 96 Akta tersebut; dan (e) sama ada isteri dapat bergantung pada s 95 Akta tersebut yang dipinda sebagai alasan untuk permohonan perubahan.

Diputuskan, menolak permohonan perubahan tanpa perintah kos:

(1) Perintah dan penghakiman dalam prosiding perkahwinan adalah muktamad. Tidak ada perbezaan dalam perintah mahkamah dan penghakiman dalam prosiding perkahwinan daripada perkara sivil, komersial atau jenayah. Pihak-pihak terhalang oleh doktrin res judicata untuk mengembalikan tuntutan atau perkara yang telah diadili. Pertikaian isteri bahawa proses perceraian antara dia dan suami masih belum selesai ketika Akta Pindaan berkuat kuasa pada 15 Disember 2018 kerana suami telah memindahkan dana pada bulan April 2019 berdasarkan perenggan 7.1 dekri nisi setelah Akta Pindaan berkuat kuasa disalah anggap dalam undang-undang. Tindakan suami untuk mematuhi perintah mahkamah iaitu dekri nisi, tidak membuka semula proses perceraian dan menjadikan proses tersebut masih hidup dan belum selesai. Mahkamah tidak bersetuju bahawa kerana peruntukan k 2(2) Kaedah-Kaedah Prosiding Perceraian dan Hal-Ehwal Perkahwinan 1980 ('DMPR 1980') petisyen perceraian tertunda ketika Akta Pindaan berkuat kuasa. Sekiranya isteri telah memfailkan permohonan perubahan sebelum Akta Pindaan berkuat kuasa, permohonan perubahan tersebut akan dianggap menunggu keputusan untuk tujuan DMPR 1980. Adalah salah untuk menyimpulkan bahawa proses perceraian itu dianggap sebagai menunggu keputusan DMPR 1980 ketika Akta Pindaan mula beroperasi. Ini adalah kerana dekri nisi, yang merupakan dekri terakhir mengenai petisyen perceraian, telah dibuat pada 11 Mei 2005. Oleh itu, prosiding perceraian ini bukanlah suatu 'tindakan atau prosiding yang bermula atau belum selesai sebaik sebelum tarikh permulaan kuat kuasa Akta Pindaan' seperti yang diperuntukkan di bawah s 8 Akta Pindaan (lihat perenggan 30, 40, 42, & 44–46).

(2) Seksyen 8 Akta Pindaan tidak membenarkan permohonan isteri dalam permohonan perubahan kerana baik prosiding perceraian ini mahupun permohonan perubahan adalah 'prosiding yang bermula atau belum selesai sebaik sebelum tarikh permulaan kuat kuasa Akta Pindaan' (lihat perenggan 47).

(3) Seksyen 95 Akta tersebut seperti yang dipinda oleh Akta Pindaan tidak terpakai untuk kes ini kerana dekri nisi telah diberikan sebelum Akta

Pindaan berkuat kuasa dan permohonan perubahan difailkan setelah Akta Pindaan berkuat kuasa (lihat perenggan 48).

(4) Oleh kerana prosiding perceraian ini mahupun permohonan perubahan tidak termasuk dalam peruntukan peralihan dalam s 8 Akta Pindaan, pindaan terhadap s 95 Akta tersebut, yang mulai beroperasi setelah dekri nisi diberikan dan sebelum permohonan perubahan difailkan, adalah bukan 'perubahan material dalam hal keadaan' yang membenarkan perubahan perintah nafkah anak oleh mahkamah di bawah s 96 Akta tersebut (lihat perenggan 49).

(5) Akta Pindaan tidak mempunyai kesan retrospektif kecuali seperti yang diperuntukkan dalam peruntukan peralihan dalam s 8 Akta Pindaan. Oleh kerana dekri nisi diberikan 13 tahun sebelum Akta Pindaan berkuat kuasa, prosiding perceraian ini bukanlah 'tindakan atau prosiding yang bermula atau belum selesai sebaik sebelum tarikh permulaan kuat kuasa Akta Pindaan'. Walaupun pindaan pada s 95 berlaku untuk prosiding perceraian atau permohonan perubahan, itu tidak akan menjadi 'perubahan material dalam hal keadaan'. Oleh itu, isteri tidak dapat bergantung pada s 95 Akta tersebut yang telah dipinda sebagai alasan untuk permohonan perubahan (lihat perenggan 50–53).]

Cases referred to

Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd [1995] 3 MLJ 189; [1995] 3 AMR 2559; [1995] 3 CLJ 783; [1995] 1 MLRA 611, SC (refd)

Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd [2016] 3 MLJ 122; [2015] 2 CLJ 1062, CA (refd)

Diana Clarice Chan Chiing Hw v Tiong Chiong Hoo [2002] 2 MLJ 97; [2002] 2 AMR 1527; [2002] 1 CLJ 721, CA (refd)

Dr Milton Lum Siew Wah v Malaysian Medical Council & Anor; Dr Lourdes Dava Raj Curuz Durai Raj (Proposed Intervener) [2018] MLJU 1018; [2018] 1 LNS 1083; [2018] AMR 105, CA (refd)

Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2008] 2 MLJ 812; [2007] 6 CLJ 741, CA (refd)

Hap Seng Credit Sdn Bhd v Sri Muda Haulage Sdn Bhd [2017] MLJU 1823; [2017] 8 AMR 671; [2017] 1 LNS 1729, HC (refd)

Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals [2008] 2 MLJ 622; [2008] 2 CLJ 121, FC (refd)

Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal [2017] 1 MLJ 262; [2016] 5 AMR 73; [2016] 8 CLJ 613, CA (refd)

Poonageswari a/p P Krishnan v Bailand a/l Govindanam [2019] MLJU 448; [2019] 1 LNS 688, HC (refd)

Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2) [1970] 2 MLJ 226; [1970] 1 LNS 150, FC (refd)

Tan Yeow Khoon & Anor v Tan Yeow Tat & Anor (No 2) [2000] 3 SLR 323, HC (refd)
Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal [2012] 2 MLJ 299; [2012] 1 CLJ 49; [2012] 1 AMR 489, FC (refd)
Wong Chong Kiew v Lee Hock Seng [2018] MLJU 1526; [2019] 1 LNS 915; [2019] AMEJ 0713, HC (refd)

Legislation referred to

Companies Act 1965 (repealed by the Companies Act 2016)
Companies Act 2016 s 619
Divorce and Matrimonial Proceedings Rules 1980 r 2(2)
Law Reform (Marriage and Divorce) Act 1976 ss 76, 83, 84, 95, 96, 97
Rules of Court 2012 O 14A, O 33 rr 2, 5
Rules of the High Court 1980 O 14A

Nicole Wee (Chooi & Company + Cheang & Ariff) for petitioner husband.
Honey Tan (Tay Kit Hoo with her) (Tan Law Practice) for respondent wife.

Faizah Jamaludin J:

APPLICATION

[1] This is the petitioner husband's application under O 14A and/or O 33 r 2 and/or O 33 r 5 of the Rules of Court 2012 for the determination of the five questions of law listed in para [14] below.

FACTS

[2] The marriage between the husband and wife was dissolved pursuant to a decree nisi dated 1 May 2005 ('decree nisi'), which was entered by consent between the parties.

[3] There is one child to the marriage, CLS, who reached the age of 18 years on 17 January 2018. The terms of the decree nisi included financial provisions for the maintenance, medical and dental costs and the education, including the tertiary education, of the child of the marriage.

[4] Section 95 of the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') was amended by s 7 of the Law Reform (Marriage and Divorce) (Amendment) Act 2017 (Act A1546) ('the Amendment Act'). The amendments to s 95 of the LRA by the Amendment Act are shown in the underlined words below:

95 Duration of orders for custody and maintenance

> Except where an order for custody or maintenance of a child is expressed to be for any shorter period or where any such order has been rescinded, it shall expire on the attainment by the child of the age of eighteen years or where the child is under physical or mental disability, *or is pursuing further or higher education or training*, on the ceasing of such disability *or completion of such further or higher education or training, whichever is the later*.

[5] The amendment to s 95 of the LRA came into force on 15 December 2018; after CLS reached the age of 18 years.

[6] On 18 July 2019, the wife filed an application to vary the terms of the decree nisi for the husband to be ordered to pay additional maintenance, education fees and medical costs for CLS until he completes his higher education at Swinburne University of Technology in Melbourne, Australia ('variation application'). She finds that the terms of the decree nisi is insufficient to cover CLS' current education and university expenses in Australia.

[7] It is the wife's case that the amendment to s 95 of the LRA constitutes 'a material change in circumstances' for purposes of s 96 of the LRA.

[8] This court is empowered under s 96 of the LRA to, among others, vary any order of maintenance for a child on the application of an interested person, if the court is satisfied that there has been 'a material change in circumstances'.

[9] The husband has applied for this court to determine and/or substantially dispose the wife's variation application under O 14A and/or O 33 r 2 and/or O 33 r 5 of the Rules of Court 2012 ('the ROC') ('O 14A application').

[10] The parties agree that the husband's O 14A application is suitable for disposal of case on point of law and that the O 14A application be heard and disposed off by this court prior to the wife's variation application.

IS THE VARIATION APPLICATION SUITABLE FOR DISPOSAL UNDER O 14A AND/OR O 33(2) AND/OR O 33(5) OF THE ROC?

[11] The principles governing applications under O 14A and/or O 33 r 2 and/or O 33 r 5 of the ROC are well-settled. The Federal Court in *Thein Hong Teck & Ors v Mohd Afrizan bin Husain and another appeal* [2012] 2 MLJ 299; [2012] 1 CLJ 49; [2012] 1 AMR 489, citing with approval the Court of Appeal's decision in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2007] 6 CLJ 741; reiterated that an application under O 14A of the Rules of the High Court 1980 (which is in pari materia with O 14A of the

ROC) may only be used to dispose a case if: (a) there is no dispute between the parties as to the relevant facts; or (b) the court, from its scrutiny of the pleadings, concludes that the material facts are not in dispute; and (c) the issues of fact are not interwoven with the issues of law. Hasan Lah FCJ in delivering the judgment of the Federal Court held as follows:

> [47] It is trite law that O 14A of the Rules of the High Court 1980 may only be resorted to if there is no dispute by the parties as to the relevant facts, or that the court, upon scrutinizing the pleadings concludes that the material facts are not in dispute (see *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2008] 2 MLJ 812; [2007] 6 CLJ 741). Where the issues of fact are interwoven with legal issues raised, it will be undesirable for the court to split the legal and factual determination for to do so would in effect be to give rulings in vacuo or on a hypothetical ruling, which the court will not do (see *State Bank of India v Marjani Marketing*, 1 March 1991, (CA Transcript No 91/0304 (unreported))).

[12] The test on whether a question of law or construction is suitable for determination under O 14A, was set out by the Court of Appeal in *Dato' Sivananthan a/l Shanmugam v Artisan Fokus Sdn Bhd* [2016] 3 MLJ 122; [2015] 2 CLJ 1062 as follows:

> [12] ... the test of whether the question of law or construction is 'suitable' to be determined under this order (O 14A of the Rules of Court 2012) is whether all the necessary and material facts relating to the subject matter of the question have been duly proved or admitted, and this postulates that there is no dispute or no further dispute as to the relevant facts at the time when the court proceeds to determine the question. The suitability of disposing of an action under this order depends entirely on whether the court can determine the question of law raised without a full trial of the action (see also *BP Malaysia Sdn Bhd v Zabedah bte Mohamed & Ors* [2007] 8 MLJ 384; [2007] 8 CLJ 245).

[13] In this present case, both husband and wife agree to the facts of the case. They also agree that the wife's variation application is suitable to be summarily determined by this court on questions posed in para [14] below under O 14A and/or O 33 r 2 and/or O 33 r 5 of the ROC.

QUESTIONS OF LAW FOR COURT'S DETERMINATION

[14] In this O 14A application, both the husband and the wife are seeking this court's determination on the following questions of law:

(a) whether these proceedings under Divorce Petition No S8–33–1613 of 2004 is an 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act' as provided under s 8 of the Amendment Act?

(b) whether s 8 of the Amendment Act allows for the wife's application in the variation application?

(c) whether the amended s 95 of the LRA applies to this instant case? A

(d) Whether the amendment to s 95 of the LRA is a material change in circumstance which satisfies the requirements of s 96 of the LRA?

(e) in the circumstances, whether the wife can rely on the amended s 95 of the LRA as a ground for the variation application given that: B

(i) the child of the marriage turned 18 on 17 January 2018; and/or

(ii) the terms of the decree nisi were recorded by consent on 11 May 2005; and/or C

(iii) the terms of the decree nisi includes financial provisions for the child's tertiary education.

[15] It is the wife's case that all the questions are to be answered in the affirmative, whilst it is the husband's case that they should all be answered in the negative. D

Question 1: Whether these proceedings under Divorce Petition No S8–33–1613 of 2004 is an 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act' as provided under s 8 of the Amendment Act? E

[16] The preamble of the Amendment Act states that it is 'an Act to amend the Law Reform (Marriage and Divorce) Act 1976'. The Amendment Act came into operation on 15 December 2018 pursuant to a notification in the *Gazette* PU(B) 697/2018. F

[17] Section 8 is the transitional provision in the Amendment Act. It states as follows: G

> 8 Transitional
>
> Any action or proceedings commenced or pending immediately before the date of coming into operation of this Act shall, after the date of coming into operation of this Act, be continued under the provisions of the principal Act as amended by this Act. H

[18] Francis Bennion, a former Westminster Parliamentary Counsel and author of several books on statutory interpretation, in his book *Understanding Common Law Legislation: Drafting and Interpretation* (Oxford University Press, reprinted 2013) at p 67, explained transitional provisions in Acts of Parliament as follows: I

> Where an Act contains substantive, amending or repealing enactments, it should also include transitional provisions which regulate the coming into operation of those enactments and where necessary modify their effect during the period of

transition. If the drafter has forgotten to include such provisions expressly, the court is required to draw such inferences as to the transitional arrangements as, in the light of the applicable interpretative criteria, it considers that Parliament should be taken to have intended.

Express transitional provisions spell out precisely when and how the operative parts of the Act to take effect. They serve an essential purpose, since merely to say that an enactment comes into force on a specified date is often insufficient to produce a clear legal meaning in all possible circumstances. Lord Bridge said that the purpose of a transitional provision is 'to facilitate the change from one statutory regime to another', citing Thornton's statement that 'The function of a transitional provision is to make special provision for the application of legislation comes into force' (*Britnell v Secretary of State for Social Security* [1991] 2 ALL ER 726 at pp 729–730). Failure by the drafter to include adequate transitional provisions is a frequent cause of avoidable difficulty to statute users. Face with the task of working out the intended transitional operation of the Local Government, Planning and Land Act 1980 s 47, Waller LJ said: 'The absence of any transitional provisions has made the construction of this section difficult because it is possible to argue in favour of more than one date' (*Cardshops Ltd v John Lewis Properties Ltd* [1983] QB 161 at p 165).

[19] It is clear from Bennion's commentary and from the cases cited therein that the purpose of s 8 of the Amendment Act is to facilitate the change in the affected sections of the LRA brought about by the amendments to the said sections by the Amendment Act.

[20] In *Hap Seng Credit Sdn Bhd v Sri Muda Haulage Sdn Bhd* [2017] MLJU 1823; [2017] 8 AMR 671; [2017] 1 LNS 1729, the High Court held that upon reading the transitional provision of s 619 of the Companies Act 2016 ('the CA 2016'), it is clear that the CA 2016 applied to proceedings under the Companies Act 1965 ('the CA 1965'), which had been commenced before and were pending immediately before the commencement of the Companies Act 2016. Mohd Nazlan Ghazali J dismissed the respondent's objection that the winding up petition is defective since it was made pursuant to the provisions of the CA 2016, which the winding up notice that preceded it was issued under the CA 1965.

[21] In *Wong Chong Kiew v Lee Hock Seng* [2018] MLJU 1526; [2019] 1 LNS 915; [2019] AMEJ 0713, the trial before High Court took place between June 2018 to January 2019. Aliza Sulaiman JC (as she then was) held since the divorce petition was pending before the date the Amendment Act came into operation, s 76 of the LRA as amended by the Amendment Act would apply to that case. Similarly in *Poonageswari a/p P Krishnan v Bailand a/l Govindanam* [2019] MLJU 448; [2019] 1 LNS 688, the High Court held that although trial of the divorce proceedings had completed but counsels have yet to file their written submissions post-trial when the Amendment Act came into

force, s 76 of the LRA as amended by the Amendment Act applied to the said case.

[22] The husband's position is that this divorce proceeding is clearly not an 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act' because the decree nisi was pronounced by the court with the consent of both parties on 11 May 2005 — more than 13 years before the amendments made by the Amendment Act to the LRA came into operation.

[23] The wife's position is that the divorce proceeding was 'pending immediately' before the Amendment Act came into operation.

[24] Learned counsel for the wife, Ms Honey Tan, accepts that once a judgment is entered, the proceeding comes to an end. However, she argues the decisions of the Federal Court in *Hong Leong Bank Bhd (formerly known as Hong Leong Finance Bhd) v Staghorn Sdn Bhd and other appeals* [2008] 2 MLJ 622; [2008] 2 CLJ 121 and the Court of Appeal in *Dr Milton Lum Siew Wah v Malaysian Medical Council & Anor; Dr Lourdes Dava Raj Curuz Durai Raj (Proposed Intervener)* [2018] MLJU 1018; [2018] 1 LNS 1083; [2018] AMR 105, which reiterated this legal principle, can be distinguished as they both involve civil matters, whereas this present case is a family law matter. Ms Tan submits that unlike civil and commercial matters, issues relating to children are open to variation pursuant to s 96of the Act. Additionally, as held by the Court of Appeal in *Diana Clarice Chan Chiing Hw v Tiong Chiong Hoo* [2002] 2 MLJ 97; [2002] 2 AMR 1527; [2002] 1 CLJ 721, the LRA is a piece of social legislation and should accordingly be treated as such.

[25] A second reason put forth by Ms Tan as to why the proceedings were pending when the Amendment Act came into force in December 2018 is the fact that the husband fulfilled the terms of the decree nisi only in April 2019 where he transferred funds due under an AIA education policy to the wife for the child's educational fees and expenses.

[26] The third and final reason submitted by Ms Tan is that r 2(2) of the Divorce and Matrimonial Proceedings Rules 1980 ('the DMPR 1980') states as follows:

> (2) Unless the context otherwise requires, a cause begun by application shall be treated as pending for the purposes of these Rules notwithstanding that a final decree or order has been made on the petition.

[27] Learned counsel for the wife submits the provision in r 2(2) of the DMPR 1980 is applicable to the variation application made by the wife and

A case law that the LRA is a piece of social legislation.

[28] Ms Tan contends that for this reason the child's custody and maintenance remain 'live' issues and are accordingly pending immediately before the date of coming into operation of the Amendment Act. She submits B that 'unlike other areas of law, there is no 'finality' of order in matrimonial proceedings for as long as variation application are possible under ss 83, 84, 96 and 97 of the 1976 Act ('the LRA'). The law recognises that the needs of the parties and children change over time'.

C

[29] Finality of judgments is a fundamental legal principle. It is a principle accepted by counsels for the husband and for the wife. However, learned counsel for the wife argues that because of the express statutory provisions in the ss 83, 84, 96 and 97 of the LRA empowering the court to vary or rescind orders for spousal maintenance or orders for custody or maintenance of a child, D and to vary agreements for spousal maintenance and agreements for custody or maintenance of child; there is no finality in orders or judgments made by the court in matrimonial proceedings.

[30] With respect to learned counsel for the wife, I am unable to agree with E her argument that orders and judgments in matrimonial proceedings are not final. There is no difference in court orders and judgments in matrimonial proceedings from those in civil, commercial or criminal matters. Parties are prevented by the doctrine of res judicata from re-litigating any claim or matter that has already been litigated. F

[31] It is settled law that court orders and judgments are final. Zawawi Salleh JCA (as he then was) in *Malpac Capital Sdn Bhd v Yong Toi Mee & Ors and another appeal* [2017] 1 MLJ 262; [2016] 5 AMR 73; [2016] 8 CLJ 613 G explained the necessity for the doctrine of res judicata to ensure finality of judgments:

> [19] Now, res judicata is a fundamental legal doctrine that prevents a party from relitigating any claim or defence already litigated. It is meant to ensure the finality of judgments and to conserve judicial resources whilst protecting litigants from H multiple litigation involving the same claims or issues.

[32] Peh Swee Chin FCJ in the Federal Court in *Asia Commercial Finance (M) Bhd v Kawal Teliti Sdn Bhd* [1995] 3 MLJ 189; [1995] 3 AMR 2559; [1995] 3 CLJ 783; [1995] 1 MLRA 611 explained the rationale behind I the doctrine of res judicata as follows

> the question of the public policy that there should be finality in litigation in conjunction with the exploding population; the increasing sophistication of the populace with the law and with the expanding resources of the courts being found always one step behind the resulting increase in litigation.

[33] Although order and judgments of the court are final, the parties have a 'liberty to apply' for further orders and judgments. As explained by Lord Mackay of Clashfern in *Halsbury Laws of England* (4th Ed, re-issue, Vol 37, 2001) at para 1230 and cited with approval by our Court of Appeal in *Malpac Capital* this 'liberty to apply' does not make the judgment any less final. Zawawi Salleh JCA (as he then was) quoted Lord Mackay's explanation of 'liberty to apply' in para 22 of the Court of Appeal's judgment in *Malpac Capital*:

> [22] The principles as to the scope of 'liberty to apply' provisions were stated by Lord Mackay of Clashfern in *Halsbury Laws of England*, (4th Ed, re-issue, Vol 37, 2001) para 1230 as follows:
>
> The circumstances or the nature of a judgment or order often render necessary subsequent applications to the court for assistance in working out the rights declared. All orders of the court carry with them inherent liberty to apply to the court, and there is no need to reserve expressly such liberty in the case of orders which are not final. *Where in the case of a final judgment the necessity for subsequent application is foreseen, it is usual to insert in the judgment words expressly reserving liberty to any party to apply to the court as he may be advised. The judgment is not thereby rendered any the less final; the only effect of the declaration is to permit persons having an interest under the judgment to apply to the court touching their interest in a summary way without again setting the case down.* It does not enable the court to deal with matters which do not arise in the course of working out the judgment, or to vary the terms of the order except possibly on proof of change of circumstances. Should the declaration be omitted, application may be made to have the judgment rectified by inserting it. It will not, however, be made or implied in favour of a defendant as against whom the claim has been dismissed for any other purpose than for enforcing the terms of the order, nor in favour of a claimant whose cause of action disappeared before trial but who fears that the circumstances giving rise to the cause of action may recur. (Emphasis added.)

[34] The Court of Appeal in *Malpac Capital* referred to the Federal Court decision in *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* [1970] 2 MLJ 226; [1970] 1 LNS 150 which held that 'liberty to apply' was implied in cases where final orders/ judgments have been perfected. Suffian FJ in *Sungei Biak Tin Mines Ltd v Saw Choo Theng & Anor (No 2)* held that:

> ... in every order of the court liberty to apply to the court is implied, without its being expressly reserved, *Fritz v Hobson* (1880) 14 Ch D 542.

[35] In *Tan Yeow Khoon & Anor v Tan Yeow Tat & Anor (No 2)* [2000] 3 SLR 323, which was also referred to with approval by the Court of Appeal in *Malpac Capital*, the Singapore High Court held that 'even if a subsequent order or direction were to be regarded as a variation, it would still fall within the ambit of the 'liberty to apply' provision if the order or direction were intended only to succour the original order'.

[36] It is clear from these aforementioned cases that there is implied a 'liberty to apply' in every court order/judgment, and that such 'liberty to apply' does not affect the finality of the order/judgment. It is to enable the parties to seek the court's assistance in working out the rights declared in the order/judgment; to succour the original order/judgment; or in some cases to vary the terms of the order/judgment on proof of change in circumstances.

[37] In matrimonial proceedings, in addition to the 'liberty to apply' either expressly reserved by the parties or implied into an order, the LRA provides the parties a statutory right to apply to vary an order in relation to spousal maintenance or the custody and maintenance of children of the marriage. This statutory right to apply to vary and order does not affect the finality of the order. Under s 83 of the LRA, on the application of the husband or wife, the court may vary or rescind any subsisting order for the maintenance of a spouse, if it is satisfied that the order was based on misrepresentation or mistake of fact or if there has been a material change of circumstances.

[38] Similarly, under s 96 of the LRA, on the application of any interested person, the court may vary or rescind, any order for the custody or maintenance of child, if it is satisfied that the order was based on misrepresentation or mistake of fact, or if there has been a material change of circumstances. Section 96 of the LRA reads as follows:

> 96 Power for court to vary orders for custody or maintenance
>
> The court may at any time and from time to time vary, or may rescind, any order for the custody or maintenance of a child on the application of any interested person, where it is satisfied that the order was based on any misrepresentation or mistake of fact or where there has been any material change in the circumstances.

[39] Just because the right to vary orders for spousal and child maintenance and child custody in matrimonial proceedings is codified in the LRA and not just implied or expressly reserved by the parties in orders or judgments as a 'liberty to apply', it does not mean that orders in matrimonial proceedings are any less final than orders in civil or commercial proceedings. To conclude otherwise would be contrary to established legal principles of finality of judgment and res judicata. As Zawawi Salleh JCA remarked in *Malpac Capital* 'Without finality, the process and cost of litigation would be never ending, as parties would forever be returning to the court to reargue the case and for tactical advantage'.

[40] I am also unable to agree with the wife's contention that the divorce proceedings between her and the husband was still pending when the Amendment Act came into force on 15 December 2018 because the husband had transferred funds in April 2019 pursuant to para 7.1 of the decree nisi after the Amendment Act came into force. With respect, I find this contention to be

misconceived in law. The husband's action of complying with the court order ie decree nisi, does not reopen the divorce proceedings and make the proceedings alive and pending. Based on the wife's argument, if indeed the husband's action in complying with the terms of the decree nisi makes the divorce proceedings alive and pending, it would mean that their marriage was not dissolved pursuant to the decree nisi. It follows that either party's remarriage subsequent to the decree nisi would accordingly be bigamous!

[41] In the present case, the wife — being an interested person — made the variation application under s 96 of the LRA for this court to vary the order in the decree nisi in relation to the provision of the child's maintenance and costs for the child's tertiary education on the grounds that there has been a material change in circumstances caused by the amendment of s 95 of the LRA by the Amendment Act on 15 December 2018.

[42] Finally, as for the third reason given by the wife, whilst I agree with learned counsel for the wife that r 2(2) of the DMPR 1980 applies to applications made under s 96 of the LRA, I do not agree that because of the provision in r 2(2) of the DMPR 1980 the divorce petition is pending when the Amendment Act came into force.

[43] The wife's variation application is a cause begun by application under s 96 of the LRA. Pursuant to r 2(2) of the DMPR 1980, the variation application shall be treated as pending for purposes DMPR 1980, notwithstanding that a final decree has been made on the divorce petition. The decree nisi is the final decree that has been made on the divorce petition.

[44] The wife had filed the variation application on 18 July 2019, after the Amendment Act came into operation on 15 December 2018. I find that if she had filed the variation application before 15 December 2018 ie before the Amendment Act came into operation, the variation application would have been treated as pending for purposes of the DMPR 1980.

[45] However, it is wrong to conclude that it is the divorce proceedings that is treated as pending for purposes of the DMPR 1980 when the Amendment Act came into operation. This is because the decree nisi, which is the final decree on the divorce petition, had been made on 11 May 2005.

[46] Accordingly, for these reasons, in answer to question 1, this court finds that this divorce proceedings is not an 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act' as provided under s 8 of the Amendment Act.

Question 2: Whether s 8 of the Amendment Act allows for the wife's application in the variation application?

[47] As this court has answered question 1 in the negative, the answer to question 2 is that s 8 of the Amendment Act does not allow for the wife's application in the variation application since neither this divorce proceedings nor the variation application are 'proceedings commenced or pending immediately before the date of the coming into operation of the Amendment Act'.

Question 3: Whether the amended s 95 of the LRA applies to this instant case?

[48] Section 95 of the LRA as amended by the Amendment Act does not apply to this instant case since the decree nisi had been granted before to the Amendment Act coming into force and the variation application was filed after the Amendment Act came into force.

Question 4: Whether the amendment to s 95 of the LRA is a 'material change in circumstance' which satisfies the requirements of s 96 of the LRA?

[49] As neither this divorce proceedings nor the variation application fall within the transitional provisions in s 8 of the Amendment Act, the amendment to s 95 of the LRA, which came into operation after the decree nisi was granted and before the variation application was filed, is not a 'material change in circumstances' justifying a variation of the order for maintenance of the child by this court under s 96 of the LRA.

Question 5: Whether the wife can rely on the amended s 95 of the LRA as a ground for the variation application given that (a) the child of the marriage turned 18 on 17 January 2018; (b) the terms of the decree nisi were recorded by consent on 11 May 2005; and/or (c) the terms of the decree nisi includes financial provisions for the child's tertiary education

[50] The Amendment Act does not have a retrospective effect except as provided in the transition provision in s 8 of the Amendment Act. The child reached the age of 18 years before the Amendment Act and the amendment to s 95 of the LRA came into operation.

[51] As discussed above, since the decree nisi was granted 13 years before the Amendment Act came into operation, this divorce proceedings is not 'action or proceedings commenced or pending immediately before the date into operation of the Amendment Act'.

[52] Furthermore, as there are financial provisions for the child's tertiary

education in the decree nisi, in my opinion, even if the amendment to s 95 applies to either the divorce proceedings or the variation application, it would not constitute a 'material change in circumstances'.

[53] Accordingly, for these reasons, this court finds that the wife cannot rely on the amended s 95 of the LRA as a ground for the variation application.

DECISION

[54] As questions 1 to 5 have all been answered in the negative, the variation application is accordingly dismissed.

[55] There is no order as to costs.

Variation application dismissed with no order as to costs.

Reported by Ahmad Ismail Illman Mohd Razali